4-1-2007

A critical comparison of the church-state jurisprudence of Chief Justice William Rehnquist and Justice Sandra Day O'Connor

Christy Harrison

A Critical Comparison of the Church-State Jurisprudence of Chief Justice William Rehnquist and Justice Sandra Day O'Connor

This thesis was successfully defended by Christy Harrison on 3 May 2007 and accepted by the committee members below to meet the thesis requirement for graduation with honors in Political Science at the University of Richmond.

Thesis advisor – Ellis West

Second reader – Melissa Labonte

Third reader – Daniel Palazzolo

A Critical Comparison of the Church-State Jurisprudence of Chief Justice William Rehnquist and Justice Sandra Day O'Connor

Christy Harrison
Fall 2006-Spring 2007
Honors Thesis

Christy Harrison

Table of Contents

I. *Introduction*

The relationship between government and religion is a difficult one. The question of how religious beliefs and practices should be treated by the government remains at the forefront of constitutional debate. There are concerns about religious freedom and the extent to which it conflicts with public duty. The First Amendment of the United States Constitution states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The Supreme Court's interpretation of the religion clauses has been unclear, inconsistent, and, therefore, extremely controversial. In fact, it has not become less controversial over time, but quite the opposite.

There has been no single standard of analysis of the establishment clause and the free exercise clause over the last two decades. In general, the establishment clause has been interpreted by the Court as prohibiting aid to religion, a particular religion, or a person/group because of her/his/its religion. The free exercise clause has been interpreted as prohibiting harm to religion, a particular religion, or a person/group because of her/his/its religion. Like all constitutional prohibitions, the religion clauses are not absolute prohibitions. Some aid and harm is allowed under the establishment clause and free exercise clause, respectively. Therefore, the crucial issue with respect to both clauses is where the line should be drawn between aid or harm that is allowed and that which is not allowed.

Two of the justices who have contributed significantly to the Court's adjudication of religion clause cases are former Chief Justice William Rehnquist and Justice Sandra Day O'Connor. William Rehnquist was nominated Associate Justice of the Supreme Court of the United States by President Nixon on October 21, 1971. He was then nominated Chief Justice of the Supreme Court of the United States by President Reagan on June 17, 1986 and served on the

Court until his death in 2005.[1] Throughout his time on the Court, Rehnquist fought against the expansion of federal powers and strongly advocated states' rights.[2] He believes that the only rights protected by the Constitution are explicitly stated in the document and that justices should consider the Framers' original intent when interpreting the Constitution. Therefore, he is known for his legal philosophy of judicial restraint, which interprets the U.S Constitution narrowly.[3]

Justice Sandra Day O'Connor was nominated to be the first woman justice to sit on the Supreme Court of the United States in 1981 by President Reagan. She remained on the Court until her retirement in 2006. Unlike Rehnquist, O'Connor's core legal philosophy is difficult to define. She is known to approach each case individually in order to arrive at a practical conclusion.[4]

In the first section of the paper, I will discuss Justice Rehnquist's and Justice O'Connor's interpretation and application of the religion clauses, respectively. I will then explain the similarities and differences between the two justices' approaches to the interpretation of the establishment clause and the free exercise clause. After discussing the main differences between Rehnquist's and O'Connor's religion clause jurisprudence in the second section of the paper, I will decide which justice has a clear and workable standard for distinguishing between aid or harm that is constitutional and that which is not constitutional. Therefore, the third and final section of the paper will take a position on which justice has the soundest approach in his or her interpretation and application of the religion clauses. The ultimate goal of my study will be to reach a reasoned and defensible conclusion regarding which justice's interpretation of the

---

[1] "William Hubbs Rehnquist, Biographical Data." *Cornell Law School.* <http://www.law.cornell.edu/supct/justices/rehnquist.bio.html>

[2] "William H. Rehnquist, Biography." *Oyez.com.* < http://www.oyez.org/justices/william_h_rehnquist/>

[3] "Chief Justice Rehnquist has died." *CNN.com.* September 4, 2005. <http://www.cnn.com/2005/LAW/09/03/rehnquist.obit/index.html>

[4] "Sandra Day O'Connor, Biography." *Oyez.com.* < http://www.oyez.org/justices/sandra_day_oconnor/>

religion clauses is most persuasive and whether it ought to be adopted by the Court, including its newest members.

II. *Justice William Rehnquist*

A. *Rehnquist's Method of Constitutional Interpretation*

One of the major problems associated with broadly-worded provisions such as the religion clauses is how to decide what sources justices should use to interpret the text. One approach is the original understanding approach, which argues that it is only the original meaning that has the authority to override later majority actions.[5] An opposing theory of constitutional interpretation is the moral understanding approach. This approach maintains that the Constitution reflects certain general principles of political morality. Therefore, regardless of the understanding of the drafters, justices must translate these principles in the best way into current circumstances. In this way, it is argued, the Constitution is able to adapt to changes that have occurred since the adoption of the Constitution.[6]

Justice Rehnquist has a clear legal philosophy based upon original understanding. Since Rehnquist believes that the only rights protected by the Constitution are explicitly stated in the document, he argues that justices should employ an original understanding approach. This approach focuses on determining the historical meaning of the words as they were understood by the generation in which they were enacted.

Perhaps the most important opinion written by Justice William Rehnquist regarding the interpretation of the religion clauses is his dissenting opinion in *Wallace v. Jaffree.*[7] In this opinion, he explains that the Constitution should be interpreted on the basis of its original meaning. Thus, he writes, "The true meaning of the Establishment Clause can only be seen in its

---

[5] Berg, Thomas. *The State and Religion in a Nutshell.* (Thomson West, 2004), 11.
[6] Id., 12.
[7] *Wallace v. Jaffree,* 472 U.S. 38 (1985) (J. Rehnquist, dissenting).

history,"[8] and adds, "If a constitutional theory has no basis in the history of the amendment it seeks to interpret, is difficult to apply and yields unprincipled results, I see little use in it."[9] Rehnquist has frequently criticized the Supreme Court for its misreading of the original meaning of the religion clauses, especially the establishment clause.[10]

In his dissent, Rehnquist criticizes an interpretation based upon the separation of church and state because it is not supported by historical evidence. He writes, "'The wall of separation between church and state' is a metaphor based on bad history, a metaphor which has proved useless as a guide to judging. It should be frankly and explicitly abandoned."[11] Rehnquist believes that the actions of the First Congress, as well as other primary sources and the historical circumstances surrounding the Bill of Rights, should be looked at to ascertain the original meaning of the clauses. He cites letters and statements made by Thomas Jefferson and James Madison in his *Jaffree* dissent, in addition to what was said and done at the First Congress, as examples of historical evidence used in an original understanding approach.[12] Rehnquist supports the use of historical evidence to interpret the religion clauses and not what the Court has added to their original meaning. Therefore, Rehnquist's approach regarding the interpretation of the religion clauses is based upon a belief that they should be understood based upon the words contained in the clause and the primary sources, historical circumstances, and congressional proceedings that produced them.

On the other hand, because the religion clauses have been incorporated into the due process clause of the fourteenth amendment and thereby applied to the states, even though

---

[8] Id., 114.
[9] Id., 113.
[10] Derek Davis, *Original Intent: Chief Justice Rehnquist and the Course of American Church/State Relations,* (Amherst, NY: Prometheus Books, 1991), 83.
[11] *Wallace v. Jaffree,* 472 U.S. 38, 107 (1985) (J. Rehnquist, dissenting).
[12] Id., 99.

originally they were only intended to apply to the federal government, Rehnquist has stated that he is not sure how the clauses, as applied to the states, should now be interpreted. In his dissenting opinion in *Thomas v. Review Board,* Rehnquist states that the Court has misinterpreted the religion clauses and, thus, created "tension" between them. He contends that "the decision by this Court that the First Amendment was 'incorporated' into the Fourteenth Amendment and thereby made applicable against the States" is one of the causes of this tension.[13] Nevertheless, he does accept the application of the clauses to the states, even though he may disagree with it. Thus, Rehnquist says, "Given the 'incorporation' of the Establishment Clause as against the States via the Fourteenth Amendment in *Everson,* States are prohibited as well from establishing a religion or discriminating between sects."[14]

Another issue that Rehnquist has addressed is the meaning of the word "religion" in the First Amendment. He did this most clearly in his dissent in *Thomas v. Review Board* and *Elk Grove Unified School District v. Newdow.*[15] In *Thomas,* Rehnquist distinguishes between religion and personal philosophical choices. He writes,

> "In this case, the Supreme Court of Indiana 'found the basis and the precise nature of Thomas' belief unclear' and concluded that the belief was more 'personal philosophical choice' than religious belief. The Court's failure to make clear whether it accepts or rejects this finding by the Indiana Supreme Court, the highest court of the State, suggests that a person who leaves his job for purely 'personal philosophical choices' will be constitutionally entitled to unemployment benefits. If that is true, the implications of today's decision are enormous. Persons will then be able to quit their jobs, assert they did so for personal reasons, and collect unemployment insurance."[16]

This suggests that Rehnquist believes that the First Amendment draws a line between religion and personal philosophy.

Rehnquist also differentiates between religion and our nation's religious history and character. In his *Newdow* opinion, he writes, "The phrase 'under God' in the Pledge seems, as a

---

[13] *Thomas v. Review Board,* 450 U.S. 707, 722 (1981) (J. Rehnquist, dissenting).
[14] *Wallace v. Jaffree,* 472 U.S. 38, 114 (1985) (J. Rehnquist, dissenting).
[15] *Elk Grove Unified School District v. Newdow,* 542 U.S. 1, 27 (2004) (J. Rehnquist, concurring).
[16] *Thomas v. Review Board,* 450 U.S. 707, 724 (1981) (J. Rehnquist, dissenting).

historical matter, to sum up the attitude of the Nation's leaders, and to manifest itself in many of our public observances."[17] In addition, Rehnquist argues, "I do not believe that the phrase 'under God' in the Pledge converts its recital into a 'religious exercise' of the sort described in *Lee*. Instead, it is a declaration of belief in allegiance and loyalty to the United States flag and the Republic that it represents. The phrase 'under God' is in no sense a prayer, nor an endorsement of any religion, but a simple recognition of the fact."[18] He acknowledges that our people and our institutions reflect the tradition that our nation was founded on a fundamental belief in God. However, he states that reciting or listening to the pledge is not a religious exercise, but a patriotic one, because no one promises to adhere to a particular God, faith, or church. Rather, participants promise fidelity to our flag and our nation.[19] Therefore, Rehnquist acknowledges that there is a difference between religion and the role it has played in our history.

Rehnquist also reconciles the role played by religion and religious traditions throughout our nation's history with the relationship between government and religion in the majority opinion in *Van Orden v. Perry.*[20] This case dealt with the display of the Ten Commandments on government property outside the Texas State Capitol and whether the public display violated the establishment clause. Rehnquist's argument is similar to his argument in *Newdow*. He states that acknowledgement of the role that the Ten Commandments have played throughout our nation's history is extremely common in America.

Rehnquist summarizes the relationship between religion and government based upon two competing faces. He writes, "One face looks toward the strong role played by religion and religious traditions throughout our Nation's history...The other face looks toward the principle

---

[17] *Elk Grove Unified School District v. Newdow,* 542 U.S. 1, 27 (2004) (J. Rehnquist, concurring).
[18] Id., 32.
[19] Id.
[20] *Van Orden v. Perry,* 545 U.S. 677 (2005) (J. Rehnquist, majority).

that governmental intervention in religious matters can itself endanger religious freedom. This case, like all Establishment Clause challenges, presents us with the difficulty of respecting both faces. Our institutions presuppose a Supreme Being, yet these institutions must not press religious observances upon their citizens."[21] He concludes that although the display of the Ten Commandments has religious significance, it also represents the nation's political and legal history.[22] Rehnquist, once again, emphasizes the American tradition of religious acknowledgements and its consistency with previous Court opinions.

B. *Rehnquist's Interpretation of the Establishment Clause*

Rehnquist narrowly interprets what the establishment clause prohibits. After discussing the history surrounding the adoption of the religion clauses, Rehnquist concludes, "It would seem from this evidence that the Establishment Clause of the First Amendment had acquired a well-accepted meaning: it forbade establishment of a national religion, and forbade preference among religious sects or denominations."[23] He believes that the government must be neutral toward different religions but does not have to be neutral toward religion and irreligion. According to Rehnquist, the establishment clause prohibits "government support of proselytizing activities of religious sects by throwing the weight of secular [authorities] behind the dissemination of religious tenets" and "purposeful assistance directly to the church itself or to some religious group...performing ecclesiastical functions."[24] Therefore, Rehnquist believes that the establishment clause prohibits only laws that advance a particular religion and not those that advance religion in general or all religions equally. He writes, "The Establishment Clause did not require government neutrality between religion and irreligion, nor did it prohibit the

[21] Id., 684.
[22] Id., 692.
[23] *Wallace v. Jaffree,* 472 U.S. 38, 107 (1985) (J. Rehnquist, dissenting).
[24] *Thomas v. Review Board,* 450 U.S. 707, 727 (1981) (J. Rehnquist, dissenting).

Federal Government from providing nondiscriminatory aid to religion."[25] Discriminatory, or preferential aid, is aid that goes to one particular religion or some, but not all religions. Therefore, Rehnquist believes that direct aid that is preferential in nature is prohibited by the establishment clause.

An example of a law that aids religion in general or all religions equally that Rehnquist is willing to allow is found in *Stone v. Graham.* This case involved a Kentucky statute requiring the posting of the Ten Commandments in public schools.[26] Rehnquist writes, "The Court's emphasis on the religious nature of the first part of the Ten Commandments is beside the point. The document as a whole has had significant secular impact, and the Constitution does not require that Kentucky students see only an expurgated or redacted version containing only the elements with directly traceable secular effects."[27] Since Rehnquist thinks that the primary purpose/effect of the law is secular in nature, which in this case is to teach good morals, the aid to religion is secondary or indirect. Therefore, Rehnquist is willing to allow government aid to particular religions so long as the aid is secondary and/or indirect.

Rehnquist's argument in *Mueller v. Allen,* which upheld tax deduction for certain expenses incurred in sending one's child to a religious school, also clearly illustrates his position that secondary or indirect aid to religion is permissible. He argues that the State's decision to reduce parents' cost in sending their children to school has a purpose that is both secular and understandable: education.[28] Although Rehnquist acknowledges that religious institutions may benefit very substantially from the allowance of such deductions, this does not render such

---

[25] *Wallace v. Jaffree,* 472 U.S. 38, 107 (1985) (J. Rehnquist, dissenting).
[26] *Stone v. Graham,* 449 U.S. 39, (1980) (J. Rehnquist, dissenting).
[27] Id., 46.
[28] *Mueller v. Allen,* 463 U.S. 388, 396, (1983), (J. Rehnquist, majority).

provisions of a State's tax law as violations under the establishment clause.[29] This is because Rehnquist believes that if a particular religion benefits indirectly or secondarily from the law, it does not matter so long as the primary purpose and effect of the law is secular.

Rehnquist's opinion in *Van Orden v. Perry* remains consistent with his previous decisions in *Stone v. Graham* and *Mueller v. Allen.* This case involved the display of the Ten Commandments on government property outside the Texas State Capitol. Rehnquist's analysis in *Van Orden* is dependent upon the purpose and nature of the monument.[30] He acknowledges that the Ten Commandments are religious in nature and that the monument has religious significance but argues that "Simply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause."[31] Rehnquist states that the monument's primary purpose and effect is secular and thus, does not violate the First Amendment. He writes, "Indeed, we need not decide in this case the extent to which a primarily religious purpose would affect our analysis because it is clear from the record that there is no evidence of such a purpose in this case."[32] In other words, if the primary purpose and effect of a law is secular in nature, then it does not matter to Rehnquist if a particular religion benefits indirectly or secondarily from the law.

Another establishment clause issue that Rehnquist addresses is whether the aid to religion is coming primarily from the government or from private persons or groups. *Santa Fe v. Independent School District v. Doe* clearly addresses this question, because the issue in that case was whether a Texas school district policy authorizing a high school student's delivery of an "invocation and/or message" before home varsity football games violates the establishment of

---

[29] Id., 397.
[30] *Van Orden v. Perry,* 545 U.S. 687 (2005) (J. Rehnquist, majority).
[31] Id., 691.
[32] Id., 692.

religion clause.[33] Rehnquist argues that "the Court misconstrues the nature of the 'majoritarian election' permitted by the policy as being an election on 'prayer' and 'religion.' To the contrary, the election permitted by the policy is a two-fold process whereby students vote first on whether to have a student speaker before football games at all, and second, if the students vote to have such a speaker, on who that speaker will be."[34] He continues, "But it is possible that the students might vote not to have a pregame speaker, in which case there would be no threat of a constitutional violation. It is also possible that the election would not focus on prayer, but on public speaking ability or social popularity. And if the student campaigning did begin to focus on prayer, the school might decide to implement reasonable campaign restrictions."[35] Rehnquist determined that the election was enough to prevent the private aid to religion on the part of the students from becoming government aid that violates the establishment clause.

It can be concluded that Rehnquist believes that the establishment clause prohibits only laws that directly and primarily advance a particular religion or some, but not all religions. Therefore, he believes that nondiscriminatory, indirect aid to religion in general or all religions equally is constitutional. What matters for Rehnquist is whether a law's primary purpose or effect is secular. If it is, then it should be upheld even though it benefits some religions to some degree.

C. *Rehnquist's Interpretation of the Free Exercise Clause*

One of the main issues associated with the interpretation of the free exercise clause is distinguishing between harm that is constitutional and that which is not constitutional. There are two ways that a law might harm religion or burden the free exercise thereof: directly or primarily and indirectly or secondarily. A law that directly or primarily harms religion is one that singles

[33] *Santa Fe Independent School District v. Doe,* 530 U.S. 290 (2000) (J. Rehnquist, dissenting).
[34] Id., 821.
[35] Id., 822.

out conduct for restriction simply because it is religious. A law that indirectly or secondarily harms religion occurs when religious conduct is not singled out for prohibition, but collides with a general standard of conduct imposed on all citizens equally.[36] When a law directly threatens the free exercise of religion, the issue is whether the law itself is constitutional. However, when it only indirectly does so, the issue is not whether the law is constitutional, but whether the person/group whose free exercise of religion is threatened by the law should be exempt from having to obey the law. Some justices, like O'Connor, believe that it does and favor granting exemptions. Rehnquist, however, does not.

There are very few free exercise cases involving direct government harm to religion. However, there have been several cases involving a law that discriminated against a religious group. The Court struck down those laws, but on the grounds that they violated the group's freedom of speech and/or press. One such case was *Rosenberger v. University of Virginia,* in which the university refused to provide funding for a publication because it "primarily promotes or manifests a particular belief in or about a deity or an ultimate reality."[37] The Court had to determine whether the University of Virginia violated the First Amendment rights of its Christian magazine staff by denying them the same funding resources that it made available to secular student-run magazines. Rehnquist agreed with the Court's decision, which is that if the government is going to provide aid, financial or otherwise, to all kinds of groups or activities, it cannot exclude religious groups and activities from receiving the aid without violating their freedom of speech.

Regarding laws that discriminate against a religious group, Rehnquist addressed the question of whether or not a law that provides funds for all kinds of education but excludes the

---

[36] Berg 28.
[37] *Rosenberger v. University of Virginia,* 515 U.S. 819, 828 (1995) (J. Kennedy, majority).

use of those funds to pay for a theological education is unconstitutional in *Locke v. Davey.* In his opinion, Rehnquist addresses whether a policy denying scholarship money to those individuals pursuing a devotional degree violates the free exercise clause.[38] In his discussion, he says that not all harm (in this case a "minor burden") to religion is prohibited under the free exercise clause. Rehnquist explains, "The State's interest in not funding the pursuit of devotional degrees is substantial and the exclusion of such funding places a relatively minor burden on Promise Scholars."[39] In addition, he writes, "We believe that the entirety of the Promise Scholarship Program goes a long way toward including religion in its benefits. The program permits students to attend pervasively religious schools, so long as they are accredited."[40] According to Rehnquist, so long as the government does not require students to choose between their particular religious beliefs and receiving a governmental benefit, the government is permitted to deny funding to a certain group of individuals, even if it places a minor burden upon that group.

The main issue associated with the interpretation of the free exercise clause is whether it guarantees religion-based exemptions from valid, secular laws that most persons have to obey. Since Rehnquist does not believe that the free exercise clause guarantees religion-based exemptions from generally applicable laws, he is willing to allow some restrictions or burdens on the free exercise of religion. While Rehnquist believes that the free exercise clause prohibits directly targeting and harming a particular religion or religion in general, he believes that indirect, unintended harm to religion is allowed under the free exercise clause.

Rehnquist strongly believes that the free exercise clause does not guarantee a right to religion-based exemptions from valid, secular laws that are generally applicable. He writes, "I believe that, although a State could choose to grant exemptions to religious persons from

---

[38] *Locke v. Davey,* 520 U.S. 712, 726 (2004) (J. Rehnquist, majority).
[39] Id.
[40] Id., 725.

state...regulations, a State is not constitutionally required to do so."[41] He explains, "Where...a state has enacted a general statute, the purpose and effect of which is to advance the State's secular goals, the Free Exercise Clause does not, in my view, require the State to conform that statute to the dictates of religious conscience to any group."[42] If a law has a primarily secular purpose and effect, then indirect harm, just like indirect aid, is allowed.

According to Rehnquist, the state of Indiana did not violate the free exercise clause in *Thomas v. Review Board* when it enacted an unemployment statute that provided no exemptions for religious reasons from a rule that prohibited persons who refused to work for personal reasons from receiving unemployment compensation. He determines that Thomas was not singled out by the state and, therefore, there is no reason for the Court to single him out for special exemption. Rehnquist concludes that the state has the right to make its own judgments about the kind of exemptions, if any, it would grant.[43] Therefore, Rehnquist contends that indirect, nondiscriminatory harm is always allowed under the free exercise clause.

Rehnquist elaborates upon this view in his majority opinion in *Goldman v. Weinberger,* which addressed whether a Jewish Air Force officer who wanted to wear a yarmulke while on duty indoors had a right to be exempt from an Air Force regulation relating to uniforms.[44] He explains, "But the First Amendment does not require the military to accommodate such practices in the face of its view that they would detract from the uniformity sought by the dress regulations...The Air Force has drawn the line essentially between religious appeal that is visible and that which is not, and we hold that those portions of the regulations challenged here reasonably and evenhandedly regulate dress in the interest of the military's perceived need for

---

[41] *Thomas v. Review Board,* 450 U.S. 707, 724 (1981) (J. Rehnquist, dissenting).
[42] Id.
[43] Davis 121.
[44] *Goldman v. Weinberger,* 475 U.S. 503, 511 (1986) (J. Rehnquist, majority).

uniformity."[45] He contends that accommodation is not required due to an overriding interest, the need of the military to ensure uniformity. Therefore, it is clear that Rehnquist believes the free exercise clause does not guarantee a right to religion-based exemptions from valid, secular laws that are generally applicable.

It seems that Rehnquist would vote to uphold virtually any law that does not directly and obviously interfere with religious exercise. Rehnquist's understanding of the religion clauses allows governments at all levels to accommodate and support religious practices if they choose to do so. Therefore, he also believes that governments at all levels may limit religious practices if they choose to do so.[46] In addition, Rehnquist's lengthy dissent in *Thomas* exhibits his view that if state and local governments pass valid, generally applicable laws prohibiting conduct that conflicts with a citizen's religious beliefs or conduct, then the government regulation will prevail.[47]

It can be concluded that Rehnquist believes that the free exercise clause prohibits direct harm to religion. He also believes that indirect, unintended harm to religion is permitted under the free exercise clause. When a law indirectly harms religion, the issue is not whether the law is constitutional, but whether the person/group whose free exercise of religion is threatened by the law should be exempt from having to obey the law. Since he believes that indirect, unintended harm to religion is permissible, he does not favor granting religion-based exemptions from generally applicable laws.

D. *Rehnquist on How to Resolve the Tension between the Two Clauses*

Because Rehnquist narrowly interprets both the free exercise clause and the establishment clause, he does not think that the two clauses necessarily conflict with one another.

---

[45] Id.
[46] Davis 128.
[47] Id., 150.

Although he admits that there is tension between the free exercise clause and the establishment clause in the Court's opinions, he believes that "the 'tension' is largely of this Court's own making, and would diminish almost to the vanishing point if the Clauses were properly interpreted."[48] Rehnquist adds, "I would agree that the Establishment Clause, properly interpreted, would not be violated if Indiana voluntarily chose to grant unemployment benefits to those persons who left their jobs for religious reasons. But I also believe that the decision below is inconsistent with many of our prior Establishment Clause cases. Those cases, if faithfully applied, would require us to hold that such voluntary action by a State *did* violate the Establishment Clause."[49] Rehnquist is saying that if a state were required to grant religion-based exemptions from valid, secular laws, it would come dangerously close to "establishing" religion under the Court's current interpretation of the establishment clause. This implies that Rehnquist believes that a narrower interpretation of both the free exercise and the establishment clause will resolve the existing tension between the two clauses.

Justice Rehnquist's call for a narrower interpretation of both the establishment clause and the free exercise clause reflects the principle of benevolent neutrality. Rather than call for complete neutrality between religion and irreligion, Rehnquist believes that only neutrality among particular religions is required by the religion clauses. For Rehnquist, the natural corollary to the permissible accommodation of religion under the establishment clause is the permissible restriction of religion under the free exercise clause. Rehnquist's interpretation of the establishment clause allows for the accommodation of religion, while on the other hand, his interpretation of the free exercise clause does not accommodate religion. In both cases,

[48] *Thomas v. Review Board,* 450 U.S. 707, 723 (1981) (J. Rehnquist, dissenting).
[49] Id., 725.

Rehnquist is deferring to majoritarian democracy.[50] Such an approach, according to Rehnquist, would solve the problems created by the Court.

III. *Justice Sandra Day O'Connor*

A. *O'Connor's Method of Constitutional Interpretation*

Justice Sandra Day O'Connor interprets the free exercise clause and establishment clause on the basis of their original meaning. However, whereas she finds the original meaning of the free exercise clause to be clear, she does not find the meaning of the establishment clause to be as clear. In her dissenting opinion in *City of Boernes v. Flores,* she relies on historical evidence to cast doubt on the Court's current interpretation of the free exercise clause.[51] She writes, "The record instead reveals that its drafters and ratifiers more likely viewed the Free Exercise Clause as a guarantee that the government may not unnecessarily hinder believers from freely practicing their religion."[52] O'Connor uses historical evidence to show that when religious beliefs conflict with civil law, the free exercise clause was originally meant to allow religion to prevail unless important state interests require otherwise. She explains, "Although the Framers may not have asked precisely the questions about religious liberty that we do today, the historical record indicates that they believed that the Constitution affirmatively protects religious free exercise and that it limits the government's ability to intrude on religious practice."[53] In order to discern the original meaning of the free exercise clause, O'Connor discusses the existence of state constitutional provisions, the practice of colonies and early states in regards to religion, and the writings of early leaders who helped to shape our Nation.

---

[50] Davis 150.
[51] *City of Boernes v. Flores,* 521 U.S. 507, 550 (1997) (J. O'Connor, dissenting).
[52] Id.
[53] Id., 551.

Although O'Connor primarily relies upon the original meaning of the religion clauses, she is not limited by it when that meaning is unclear. In her concurring opinion in *Wallace v. Jaffree,* she explains, "This uncertainty as to the intent of the Framers of the Bill of Rights does not mean we should ignore history for guidance on the role of religion in public education. The Court has not done so. When the intent of the Framers is unclear, I believe we must employ both history and reason in our analysis."[54] This suggests that O'Connor primarily relies upon an original understanding approach when interpreting the establishment clause but is not limited by it when that meaning is unclear.

Another issue that O'Connor has addressed, although briefly, is the meaning of the word "religion" in the First Amendment. O'Connor fails to differentiate between religion and personal philosophical choice like Rehnquist does. However, she does vaguely address the question of what constitutes religion in *Elk Grove Unified School District v. Newdow.* In *Newdow,* O'Connor distinguishes between religion and ceremonial deism. She acknowledges that the Court has permitted the government, in some instances, to refer to or commemorate religion in public life and believes "that although those references speak to the language of religious belief, they are more properly understood as employing the idiom for essentially secular purposes."[55] One such purpose is the role of religion in our history.

O'Connor also uses history to affirm the view that religious freedom is so fundamental that it is appropriate for the Court to apply it to the states via the due process clause of the fourteenth amendment. In *McCreary County v. ACLU,* O'Connor discusses the Founders' plan to preserve religious liberty to the fullest extent possible in a pluralistic society.[56] She writes, "Our guiding principle has been James Madison's--that '[t]he Religion . . . of every man must be

[54] *Wallace v. Jaffree,* 472 U.S. 38, 82 (1985) (J. O'Connor, concurring).
[55] *Elk Grove Unified School District v. Newdow,* 542 U.S. 1, 36 (2004) (J. O'Connor, concurring).
[56] *McCreary County v. ACLU,* 545 U.S. 844, 883 (2005) (J. O'Connor, concurring).

left to the conviction and conscience of every man.' To that end, we have held that the guarantees of religious freedom protect citizens from religious incursions by the States as well as by the Federal Government."[57] It can be inferred through O'Connor's discussion of the importance of religious liberty that she supports the incorporation of the religion clauses into the due process clause of the Fourteenth Amendment and thus, their application to the states.

O'Connor distinguishes between the free exercise clause and the establishment clause on the basis of coercion. Although proof of coercion provides a basis for a claim under the free exercise clause, it is not a necessary element of a claim under the establishment clause.[58] O'Connor writes, "An Establishment Clause standard that prohibits only 'coercive' practices or overt efforts at government proselytization, but fails to take account of the numerous more subtle ways that government can show favoritism to particular beliefs or convey a message of disapproval to others, would not, in my view, adequately protect the religious liberty or respect the religious diversity of the members of our pluralistic political community."[59] Whereas the free exercise clause is limited to direct coercion, the establishment clause is not. Merely showing favoritism to particular beliefs or religion in general is enough to provide the basis for a claim under the establishment clause.

B. *O'Connor's Interpretation of the Establishment Clause*

In her establishment clause analysis, O'Connor uses the endorsement test. According to it, if a statute's primary purpose or effect is to convey a message of government endorsement or disapproval of a particular religion or religion in general, it violates the establishment clause. O'Connor's endorsement test relies on whether an objective observer, familiar with the text,

---

[57] Id.
[58] *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter,* 492 U.S. 573, 629 (1989) (J. O'Connor, concurring).
[59] Id., 629.

legislative history, and implementation of the statute, would perceive a government message either favoring or disfavoring of religion in general or of a particular religion. In addition, the endorsement test requires that the government not make religion relevant to a person's standing in the political community.[60]

In *Wallace v. Jaffree,* O'Connor argues that "the endorsement test does not preclude the government from acknowledging religion or taking religion into account in making law and policy. It does preclude government from attempting to convey a message that religion or a particular religious belief is favored or preferred."[61] O'Connor writes, "What is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion. It is only practices having that effect, whether intentionally or unintentionally, that make religion relevant, in reality or public perception, to status in the political community."[62]

O'Connor clearly addresses the importance of public perception in determining the presence of endorsement or disapproval of religion in general or a particular religion. In her concurring opinion in *Mitchell v. Helms,* she argues that in terms of public perception, a government program of direct aid to religious schools based on the number of students attending each school differs meaningfully from the government distributing aid directly to individual students.[63] She writes, "I believe the distinction between a per-capita school-aid program and a true private-choice program is significant for purposes of endorsement."[64] O'Connor continues,

> "In terms of public perception, a government program of direct aid to religious schools based on the number of students attending each school differs meaningfully from the government distributing aid directly to individual students who, in turn, decide to use the aid at the same religious schools. In the former example, if the religious school uses the aid to inculcate religion in

[60] *Lynch v. Donnelly,* 465 U.S. 668, 693 (1984) (J. O'Connor, concurring).
[61] *Wallace v. Jaffree,* 472 U.S. 38, 71 (1985) (J. O'Connor, concurring).
[62] *Lynch v. Donnelly,* 465 U.S. 668, 693 (1984) (J. O'Connor, concurring).
[63] *Mitchell v. Helms,* 530 U.S. 793, 844 (2000) (J. O'Connor, concurring).
[64] Id., 843.

> its students, it is reasonable to say that the government has communicated a message of endorsement. Because the religious indoctrination is supported by government assistance, the reasonable observer would naturally perceive the aid program as *government* support for the advancement of religion. That the amount of aid received by the school is based on the school's enrollment does not separate the government from the endorsement of the religious message."[65]

O'Connor contends that direct aid is unconstitutional because it necessarily entails endorsement.

There are three important cases that illustrate O'Connor's acceptance of the use of state funds for religious purposes.[66] In *Lynch v. Donnelly,* O'Connor upheld state support for a Christmas nativity display on the grounds that it primarily served the secular purpose of celebrating a public holiday.[67] She determined that the establishment clause permitted the use of state funds for religious purposes when the purpose was secular and did not constitute a message of endorsement. In a second case, *Rosenberger v. University of Virginia,* O'Connor explained that the university's public financing of a religious periodical, along with student news, information, opinion, entertainment, or academic communications media groups, would not violate the Establishment Clause.[68] Because the university subsidized such a wide array of activities and expression, it was extremely unlikely that anyone would think that the university itself endorsed any particular message communicated by the student groups whose activities it financed.[69] In a third case, *Mitchell v. Helms,* O'Connor determined that "in contrast, when government aid supports a school's religious mission only because of independent decisions made by numerous individuals to guide their secular aid to that school, 'no reasonable observer is likely to draw from the facts...an inference that the State itself is endorsing a religious practice or belief.'"[70] These three cases all show a clear application of O'Connor's endorsement test. If a

---

[65] Id., 844.

[66] Brownstein, Alan. "A Decent Respect for Religious Liberty and Religious Equality: Justice O'Connor's Interpretation of the Religion Clauses of the First Amendment." *McGeorge Law Review*: Spring, 2001, 864.

[67] *Lynch v. Donnelly,* 465 U.S. 688 (1984) (J. O'Connor, concurring).

[68] *Rosenberger v. University of Virginia,* 515 U.S. 819, 853 (1995) (J. O'Connor, concurring).

[69] Id.

[70] *Mitchell v. Helms,* 530 U.S. 793, 844 (2000) (J. O'Connor, concurring).

law does not have the primary purpose or effect of endorsing or disfavoring religion in general or a particular religion, it is constitutional.

O'Connor does not remain committed to the endorsement test in all of her opinions, however. In *Board of Education of Kiryas Joel v. Grumet,* she fails to adhere to a single test under the establishment clause. She writes, "But the same constitutional principle may operate very differently in different contexts...And setting forth a unitary test for a broad set of cases may sometimes do more harm than good."[71] O'Connor continues, stating that her endorsement test is not the only test that should be used. She writes, "Relatively simple phrases like 'primary effect...that neither advances nor inhibits religion' and 'entanglement' acquire more and more complicated definitions which stray even further from their literal meaning. Distinctions are drawn between statutes whose effect is to advance religion and statutes whose effect is to allow religious organizations to advance religion."[72] This leads her to conclude that, "Experience proves that the Establishment Clause, like the Free Speech Clause, cannot easily be reduced to a single test. There are different categories of Establishment Clause cases, which may call for different approaches."[73] She discusses four different categories of establishment clause cases and says that different tests should be used for each of them. O'Connor differentiates between cases that involve government action targeted at particular individuals, cases involving government speech on religious topics, cases in which the government must make decisions about matters of religious doctrine and religious law, and cases involving government delegations of power to religious bodies.[74] If there is no single test for deciding establishment clause cases, then this implies that there is no single interpretation of the clause. O'Connor's

[71] *Board of Education of Kiryas Joel v. Grumet,* 512 U.S. 687, 719 (1994) (J. O'Connor, concurring).
[72] Id., 720.
[73] Id., 721.
[74] Id.

Grumet opinion varies significantly from her opinions in other establishment clause cases in which she applied the endorsement test.

Although O'Connor believes government endorsement of religion or a particular religion is prohibited under the establishment clause, she is willing to allow for the "accommodation" of religion. This means that she supports, in certain situations, accommodating or exempting religious conduct in the face of general laws. *Corporation of Presiding Bishop v. Amos* involved a janitor employed at a nonprofit gymnasium which was operated by nonprofit corporations affiliated with the Church of Jesus Christ of Latter-Day Saints.[75] Because the employee failed to qualify for a "temple recommendation" certifying that he was a member of the church, he was discharged. After he was discharged, the janitor alleged that he faced discrimination in employment on the basis of religion, thus violating 703 of the Civil Rights Act of 1964. The corporations moved to dismiss the claim on the basis of 702 of the Civil Rights Act of 1964, which exempts religious organizations from bans on religious discrimination in employment.[76] O'Connor concluded that 702 of the Civil Rights Act of 1964 did exempt the Church of Jesus Christ of Latter-Day Saints from a generally applicable regulatory burden and did not violate the establishment clause.

In her opinion, O'Connor determined that an objective observer, according to her endorsement test, would perceive government support of the church's right to hire and fire employees on the basis of religion as an accommodation of religion rather than government endorsement of religion.[77] She writes, "The necessary first step in evaluating an Establishment Clause challenge to a government action lifting from religious organizations a generally applicable regulatory burden is to recognize that such government action *does* have the effect of

---

[75] *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 348 (1987) (J. O'Connor, concurring).
[76] Id.
[77] Id., 349.

advancing religion. The necessary second step is to separate those benefits to religion that constitutionally accommodate the free exercise of religion from those that provide unjustifiable awards of assistance to religious organizations."[78] Therefore, O'Connor determines that the endorsement of religion is not the same as accommodation of religion. O'Connor argues that even if the government action can be characterized as "allowing" religious organizations to advance religion, it will be upheld so long as government action itself does not directly advance religion.[79] According to O'Connor, special treatment in this case is intended to protect religious liberty (in this case, a church's hiring process) from government regulation.

In *Board of Education of Kiryas Joel v. Grumet,* O'Connor attempts to differentiate between accommodation and "unjustifiable awards of assistance" to religion. She begins by saying that a law must be generally applicable, meaning that it is nondiscriminatory and impartial toward religion. It must treat all groups, religious and nonreligious, equally. Because of this notion, O'Connor argues that government classifications based on religion must be strictly scrutinized to ensure that the government is not directly favoring or disfavoring of religion or a particular religious belief. O'Connor writes, "What makes accommodation permissible, even praiseworthy, is not that the government is making life easier for some particular religious group as such. Rather, it is that the government is accommodating a deeply held belief." She continues, "Accommodations may thus justify treating those who share this belief differently from those who do not; but they do not justify discriminations based on sect."[80] Therefore, O'Connor believes that accommodations are permissible when it is protecting religious liberty and not directly advancing or endorsing religion.[81]

---

[78] Id.
[79] Id.
[80] *Board of Education of Kiryas Joel v. Grumet,* 512 U.S. 687, 716 (1994) (J. O'Connor, concurring).
[81] Id., 714.

Another establishment clause issue that O'Connor addresses is whether the aid to religion is coming primarily from the government or from private persons or groups. *Board of Education v. Mergens,* which involved a school administration at a high school that denied permission to a group of students to form a Christian club with the same privileges and meeting terms as other after-school student clubs, involved this issue. The case addressed the question of whether the school's prohibition against the formation of a Christian club consistent with the establishment clause rendered the Equal Access Act unconstitutional. The Equal Access Act requires that schools in receipt with federal funds provide "equal access" to student groups seeking to express messages of "religious, political, philosophical, or other content."[82] O'Connor agreed with the majority of the Court that the school, in distinguishing between "curriculum" and "noncurriculum student groups," was prohibited from denying equal access to any after-school club based on the content of its speech.[83] A noncurriculum student group refers to any student group that does not directly relate to the body of courses offered by the school. A curriculum group, on the other hand, means any student group that directly relates to a school's curriculum if the subject matter of the group is actually taught, or will soon be taught, in a regularly offered course. In addition, a curriculum group may also include any student group whose subject matter concerns the body of courses as a whole, if participation in the group is required for a particular course, or if participation results in academic credit.[84]

In her opinion, O'Connor concludes that an open-forum policy including nondiscrimination against religious speech would have a secular purpose.[85] Since the Equal Access Act also prohibits discrimination on the basis of "political, philosophical, or other"

---

[82] *Board of Education of Westside Community School v. Mergens,* 496 U.S. 226, 236 (1990) (J. O'Connor, concurring).
[83] Id., 241.
[84] Id.
[85] Id., 249.

speech as well as religious speech, it too has a secular purpose. If a State refused to let religious groups use facilities open to others, then it would send a message of government disapproval of religion. O'Connor argues that because student speech is permitted on a nondiscriminatory basis, the students are mature enough to understand that the school does not endorse or support the permitted student speech.[86] In addition, the school administration, since it has control over any impressions it gives its students, also has control over the extent to which it makes clear that its recognition of the club is not equivalent with an endorsement of the views of the club's participants.[87] O'Connor determines that because the school permits student speech on a nondiscriminatory basis, it is enough to prevent private aid to religion on the part of the school from becoming government aid that violates the establishment clause.

It can be concluded that O'Connor believes that the establishment clause prohibits laws that directly or primarily advance religion in general or a particular religion. Therefore, she believes that nondiscriminatory, indirect aid to religion in general or all religions equally is constitutional. O'Connor upholds aid to religion in general so long as it is indirect or secondary in nature.

C. *O'Connor's Interpretation of the Free Exercise Clause*

Justice O'Connor's belief that accommodations are permissible, when not directly advancing or endorsing religion, is based on her free exercise clause jurisprudence, which is related to the major issue of whether the free exercise clause guarantees a right to religion-based exemptions from valid, secular laws. O'Connor writes, "The Free Exercise Clause is properly understood as an affirmative guarantee of the right to participate in religious activities without impermissible governmental interference, even where a believer's conduct is in tension with a

[86] Id., 251.
[87] Id., 252.

law of general application."[88] She believes that the First Amendment does not distinguish between laws that target a religious practice and laws that only indirectly and unintentionally restrict or burden a religious practice.[89] She explains, "If the First Amendment is to have any vitality, it ought not be construed to cover only the extreme and hypothetical situation in which a State directly targets a religious practice."[90] Therefore, O'Connor believes that even indirect harm to religion should be prohibited as much as possible on the basis of the free exercise clause.

Since O'Connor believes that the free exercise clause, at least under certain circumstances, does guarantee a right to religion-based exemptions from generally, applicable laws, she must have some kind of standard or test for determining what those circumstances are. She contends that in order to deny a free exercise claim, the government must show that the law serves a compelling state interest. O'Connor writes, "Only an especially important governmental interest pursued by narrowly tailored means can justify exacting a sacrifice of First Amendment freedoms as the price for an equal share of the rights, benefits, and privileges enjoyed by other citizens."[91] O'Connor states that the compelling interest test is closely related to the First Amendment's guarantee of religious liberty, its preferred position, and its requirement "that the Court will not permit encroachments upon this liberty, whether direct or indirect, unless required by clear and compelling governmental interests 'of the highest order.'"[92] Therefore, O'Connor concludes that the government must show that an "unusually important" government interest is

[88] *City of Boernes v. Flores,* 521 U.S. 507, 565 (1997) (J. O'Connor, dissenting).
[89] *Employment Division of Oregon v. Smith,* 494 U.S. 872, 895 (1990) (J. O'Connor, concurring).
[90] Id.
[91] *Bowen v. Roy,* 476 U.S. 693, 729 (1986) (J. O'Connor, concurring).
[92] *Employment Division of Oregon v. Smith,* 494 U.S. 872, 896 (1990) (J. O'Connor, concurring).

at stake and that the resulting burden is the "least restrictive means" to obtain or protect the government's interest.[93]

O'Connor clearly applies the compelling state interest test in *Employment Division of Oregon v. Smith*, which dealt with the question of whether Oregon's criminal prohibition on peyote use prohibited two Native Americans' ability to freely exercise their religion.[94] Two Native Americans worked as counselors for a private drug rehabilitation organization and ingested peyote as part of their religious ceremonies. As a result, the drug rehabilitation organization fired the counselors, who then filed for unemployment compensation.[95] O'Connor clearly summarizes the main issue of the case when she writes, "Thus, the critical question in this case is whether exempting respondents from the State's general criminal prohibition 'will unduly interfere with fulfillment of the governmental interest.'"[96] She concludes that the state's interest in the uniform application of Oregon's criminal prohibition on peyote use is sufficient to override the use of peyote for religious purposes. O'Connor argues that if an exemption were granted in this case, it would severely limit Oregon's ability to prohibit the possession of peyote by its citizens.[97] She also determines that such a prohibition is the least restrictive means to address the government's interest. O'Connor writes, "Oregon's criminal prohibition represents that State's judgment that the possession and use of controlled substances, even by only one person, is inherently harmful and dangerous."[98] However, she does recognize that, "other governments may surely choose to grant an exemption without Oregon, with its specific asserted interest in uniform application of its drug laws, being *required* to do so by the First

---

[93] Spreng, Jennifer. "Failing Honorably: Balancing Tests, Justice O'Connor and Free Exercise of Religion." *Saint Louis University Law Journal*: Spring, 1994, 862.
[94] *Employment Division of Oregon v. Smith*, 494 U.S. 872, 892 (1990) (J. O'Connor, concurring).
[95] Id.
[96] Id., 906.
[97] Id., 907.
[98] Id., 906.

Amendment."[99] According to O'Connor, the use of the compelling state interest test under these specific circumstances resulting in the ruling that the free exercise clause did not require the state to accommodate these two individuals' religiously motivated conduct.

O'Connor discusses the application of the compelling state interest test in *Lyng v. Northwest Indian Cemetery Protective Association. Lyng* involved the harvesting of timber and the construction of a 75-mile road between two California towns through an area that had been historically used by members of three Indian tribes. The Indian tribes used this area to conduct a wide variety of specific religious rituals for the purpose of personal spiritual development. Therefore, the Supreme Court had to address the question of whether timber harvesting and the construction of the road through an area of religious significance to the Indians violated the free exercise clause.[100] She writes, "The Government does not dispute, and we have no reason to doubt, that the logging and road-building projects at issue in this case could have devastating effects on traditional Indian religious practices."[101] O'Connor also acknowledges the fact that the rituals would be ineffective if conducted at other sites. In addition, she also believes that too much disturbance surrounding the area used for rituals would result in a discontinuation of religious practices.[102]

In utilizing a compelling state interest test, O'Connor relies on a distinction between coercive burdens and purely incidental burdens. In her majority opinion in *Lyng v. Northwest Indian Cemetery Protective Association,* O'Connor argues that laws with the tendency to coerce

---

[99] Id., 907.
[100] *Lyng v. Northwest Indian Cemetery Protective Association,* 485 U.S. 439 (1988) (J. O'Connor, majority).
[101] Id., 452.
[102] Id.

individuals into acting contrary to their religious beliefs require a religion-based exemption.[103] She writes,

> "The building of a road or the harvesting of timber on publicly owned land cannot meaning be distinguished from the use of a Social Security number in *Roy*. In both cases, the challenged Government action would interfere significantly with private persons' ability to pursue spiritual fulfillment according to their own religious beliefs. In neither case, however, would the affected individuals be coerced by the Government's action into violating their religious beliefs; nor would either governmental action penalize the religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens."[104]

Since O'Connor concludes that the harvesting of timber on publicly owned land does not deny any person an equal share of the rights, benefits, and privileges enjoyed by other citizens, she characterizes it as a non-coercive, or incidental. The burden that arises from such activity is not coercive and therefore, not prohibited by the free exercise clause. O'Connor believes that the compelling state interest test should be used only when a law indirectly or directly coerces individuals into acting contrary to their religious beliefs. It can be concluded that when a law directly or indirectly threatens the free exercise of religion through coercion, O'Connor uses a compelling state interest test to determine whether the person/group whose free exercise of religion is threatened by the law should be exempt from having to obey the law.

D. *O'Connor on How to Resolve the Tension between the Two Clauses*

O'Connor acknowledges that an inherent tension exists between the establishment clause and the free exercise clause. She writes, "It is obvious that either of the two Religion Clauses, 'if expanded to a logical extreme, would tend to clash with the other.'"[105] She argues that the Court's call for government neutrality toward religion has exacerbated the conflict because it would be difficult to reconcile "complete neutrality" with the necessity to sometimes exempt a

---

[103] *Lyng v. Northwest Indian Cemetery Protective Association,* 485 U.S. 439, 449 (1988) (O'Connor, majority).
[104] Id.
[105] *Wallace v. Jaffree,* 472 U.S. 38, 83 (1985) (J. O'Connor, concurring).

religious observer from an otherwise generally applicable law.[106] O'Connor writes, "The solution to the conflict between the Religion Clauses lies not in 'neutrality,' but rather in identifying workable limits to the government's license to promote the free exercise of religion."[107] Since O'Connor believes that the free exercise clause, in some cases, requires the government to lift a burden on the free exercise of religion, she acknowledges that the standard establishment clause mandate test should be modified accordingly. Although a law "accommodating" religion is inherently not neutral toward religion, O'Connor believes that it can still be okay if it is protecting religious liberty and not directly advancing or endorsing religion. Therefore, even though O'Connor is committed to neutrality between religion and irreligion, as well as between particular religions, she reconciles her concept of neutrality with the need to protect religious liberty in certain circumstances, so long as it does not directly advance or endorse religion.

IV. *Rehnquist and O'Connor*

A. *A Comparison of their Interpretation of the Religion Clauses*

O'Connor and Rehnquist agree that the religion clauses should be interpreted on the basis of their original meaning. However, they differ in their consistency in adhering to such a principle. Rehnquist's dissenting opinion in *Wallace v. Jaffree* and O'Connor's concurring opinion in *Wallace v. Jaffree* both exhibit a reliance on history to obtain the meaning of the establishment clause. Rehnquist, however, has a more consistent legal philosophy based upon an original understanding of the clauses. He believes that the true meaning of the establishment clause can only be seen in its history and argues that if a constitutional theory has no basis in the

[106] Id.
[107] Id., 84.

history of the amendment it seeks to interpret, it is difficult to apply because it yields unprincipled results.[108]

Although O'Connor's opinion uses historical evidence such as the existence of state constitutional provisions, the practice of early colonies and early states in regards to religion, and the writing of early leaders who helped to shape our Nation, her approach remains inconsistent. Rather, she approaches each case individually in order to arrive at a practical conclusion. This is exhibited in her *Grumet* opinion, in which she fails to adhere to a single test under the establishment clause.[109] If there is no single test for deciding establishment clause cases, then this implies that there is no single interpretation of the clause. Rehnquist, however, stresses that the historical evidence should be correctly interpreted so as to yield consistent, principled results in religion clauses cases.

Not only do Rehnquist and O'Connor differ in their consistency in using an original understanding approach, but they hold different positions on the incorporation of the religion clauses into the Fourteenth Amendment. Although both have accepted it, Rehnquist has accepted it grudgingly and questioningly. Because the religion clauses originally were only intended to apply to the federal government, Rehnquist has acknowledged that he is not sure how the clauses should be interpreted when applied to the states. O'Connor, on the other hand, uses history to affirm the view that religious freedom is so fundamental that it is appropriate for the Court to apply it to the states via the due process clause of the fourteenth amendment.[110] The acknowledgement that the Court has guaranteed religious freedom by protecting citizens from religious incursions by the States as well as by the Federal Government suggests her acceptance of the incorporation of the religion clauses into the Fourteenth Amendment.

---

[108] *Wallace v. Jaffree,* 472 U.S. 38, 113 (1985) (J. Rehnquist, dissenting).
[109] *Board of Education of Kiryas Joel v. Grumet,* 512 U.S. 687, 719 (1994) (J. O'Connor, concurring).
[110] *McCreary County v. ACLU,* 545 U.S. 844, 883, (2005) (J. O'Connor, concurring).

B. *What is "Religion"?*

Another issue that Rehnquist and O'Connor both address is the meaning of the word "religion" in the First Amendment; however, Rehnquist addresses it at greater length than does O'Connor. Rehnquist's distinction between religion and personal philosophical choice in *Thomas v. Review Board* serves to illustrate that the First Amendment draws a line between the two.[111] O'Connor however, in *Board of Education of Kiryas Joel v. Grumet,* fails to differentiate between religion and what she calls a deeply held belief.[112] As a result, she fails to differentiate between religion and personal philosophical choice like Rehnquist does.

Both justices do, however, vaguely address what constitutes religion in *Elk Grove Unified School District v. Newdow.* In *Newdow,* O'Connor differentiates between religion and ceremonial deism. She acknowledges that in some instances, the government is allowed to refer to or commemorate religion in public life. This is because although such references use language pertaining to religious belief, they are more properly understood as having a secular purpose, which in this case is acknowledging the role religion has played in our nation's history.[113] Rehnquist offers an analysis similar to that of O'Connor, distinguishing between religion and its historical role in American history and tradition. Like O'Connor, he believes that the phrase 'under God' has a patriotic, secular purpose, thus distinguishing between religion and the role it has played in our nation's history.[114]

C. *The Establishment Clause*

Justice Rehnquist and O'Connor also agree on the fact that the establishment and free exercise clauses have different meanings. O'Connor's position on the difference between the

---

[111] *Thomas v. Review Board,* 450 U.S. 707, 724 (1981) (J. Rehnquist, dissenting).
[112] *Board of Education of Kiryas Joel v. Grumet,* 512 U.S. 687, 716 (1994). (J. O'Connor, concurring).
[113] *Elk Grove Unified School District v. Newdow,* 542 U.S. 1, 36 (2004) (J. O'Connor, concurring).
[114] Id., 27 (J. Rehnquist, concurring).

two clauses is most clearly shown in her concurring opinion in *County of Allegheny v. ACLU.* She explains that while proof of coercion provides a basis for a claim under the Free Exercise Clause, it is not a necessary element of any claim under the establishment clause.[115] Merely showing favoritism to particular beliefs or religion in general is enough to provide the basis for a claim under the establishment clause. As a result, O'Connor relies on the endorsement test. She argues that if a statute's primary purpose or effect is a message of government endorsement or disapproval of religion, it violates the establishment clause. O'Connor's endorsement test requires neutrality between religion and irreligion, as well as among particular religions. Rehnquist's interpretation of the establishment clause also relies on a concept of neutrality; however, he believes that the government must be neutral only among particular sects and not between religion and irreligion.

Thus, the major difference between O'Connor's and Rehnquist's interpretation of the establishment clause deals with whom the government should be neutral toward. O'Connor argues that the government must be neutral toward all different religions and toward religion and irreligion. Rehnquist, on the other hand, believes that the government must be neutral toward different religions but does not have to be neutral toward religion and irreligion. Although both justices differ on whom the government can not aid, they agree on what kind of aid is prohibited by the establishment clause. Rehnquist and O'Connor both agree that direct aid is prohibited while indirect, nondiscriminatory aid is permitted under the establishment clause.

Because Rehnquist and O'Connor agree on what kind of aid is prohibited by the establishment clause, they maintain the same position regarding whether the establishment clause prohibits laws accommodating the exercise or practice of religion. Rehnquist agrees with

---

[115] *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter,* 492 U.S. 573, 629, (1989) (J. O'Connor, concurring).

O'Connor that accommodation is permissible. According to O'Connor, accommodations justify treating those who share a religious belief differently from those who do not. They do not, however, justify discriminations based on sect.[116] Rehnquist agrees with O'Connor because he believes that the establishment clause does not require the government to be neutral between religion and irreligion, but only among particular religions.

Although O'Connor and Rehnquist share the same position regarding accommodations, they disagree over the point at which private aid to or endorsement of religion or a particular religion becomes government aid/endorsement that violates the establishment clause. In the *Santa Fe* case, which involved a high school student's delivery of an "invocation and/or message" before home varsity football games, Rehnquist explains that the existence of the election allows student campaigns to focus on whatever they choose; if student campaigning did begin to focus on prayer, the school could implement the necessary restrictions.[117] In this case, Rehnquist determined that the aid to religion was coming primarily from private individuals and not the government. O'Connor, however, voted exactly the opposite from Rehnquist in the *Santa Fe* case, which implies that she did not view the election as a sufficient step to ensure an absence of government endorsement.

D. *The Free Exercise Clause*

When a law directly threatens the free exercise of religion, the issue is whether the law itself is constitutional. When a law indirectly harms religion, the issue is not whether the law is constitutional, but whether the person/group whose free exercise of religion is threatened by the law should be exempt from having to obey the law. However, because Rehnquist believes that indirect, unintended harm to religion is permissible, he does not favor granting religion-based

[116] *Board of Education of Kiryas Joel v. Grumet,* 512 U.S. 687, 716 (1994) (J. O'Connor, concurring).
[117] *Santa Fe Independent School District v. Doe,* 530 U.S. 290, 821 (2000) (J. Rehnquist, dissenting).

exemptions from generally applicable laws. However, O'Connor does. She believes that laws with the tendency to coerce individuals of a religious group, whether directly or indirectly, into acting contrary to their religious beliefs are unconstitutional unless the state can show reason for the coercion. O'Connor, therefore, has a broader interpretation of the free exercise clause than Rehnquist does.

O'Connor argues that in order for the government to restrict religiously motivated conduct, it must exhibit a compelling state interest. Therefore, the government must justify any substantial burden on religiously motivated conduct by a compelling state interest and by means narrowly tailored to achieve that interest.[118] Rehnquist, however, does not employ such a test. Rather, he relies upon a distinction between direct and indirect harm. His dissent in *Thomas* clearly indicates that if state governments pass valid, generally applicable laws prohibiting conduct that conflicts with a citizen's belief or conduct, then the government regulation will prevail. As a result, Rehnquist does not believe that the free exercise clause guarantees a right to religion-based exemptions from valid, secular laws that are generally applicable. In *Thomas,* he argues that a State is not constitutionally required to grant exemptions to religious persons from state unemployment regulations.[119] He determined that Thomas was not singled out in this case and, therefore, that there was no reason for the Court to now single him out for special exemption.

E. *Tension between the Clauses*

Rehnquist and O'Connor both recognize the tension that exists between the establishment clause and the free exercise clause. Rehnquist believes that the conflict between the two clauses has been exacerbated by the Court. He argues that a "tension' exists between the free exercise

[118] *Employment Division v. Smith,* 494 U.S. 872, 895 (1990) (J. O'Connor, dissenting).
[119] *Thomas v. Review Board,* 450 U.S. 707, 724 (1981) (J. Rehnquist, dissenting).

clause and the establishment clause of the United States Constitution, but that it is largely of the Court's making, so much so that it would almost completely diminish if the clauses were properly interpreted.[120] In order to diminish the tension, Rehnquist calls for the principle of benevolent neutrality. For Rehnquist, the natural corollary to the permissible accommodation of religion under the establishment clause is the permissible restriction on the free exercise of religion.[121]

In his dissent in *Thomas v. Review Board,* Rehnquist writes, "If the Court were to construe the Free Exercise Clause as it did in *Braunfeld* and the Establishment Clause as Justice Stewart did in *Schempp*, the circumstances in which there would be a conflict between the two Clauses would be few and far between."[122] This suggests that he views *Braunfeld* as a correct reading of the Free Exercise Clause and Justice Stewart's opinion in *Schempp* as a proper interpretation of the Establishment Clause. The two plaintiffs in *Braunfeld* were members of the Orthodox Jewish faith, which required them to close their places of business from nightfall each Friday until nightfall each Saturday. They alleged that a Sunday closing law would result in an impairment of their ability to earn a living.[123] Rehnquist explains that *Braunfeld* did not make the religious practices of appellants unlawful but simply made the practice of their religious beliefs more expensive.[124] This explanation supports Rehnquist's view that the free exercise clause does not guarantee religious exemptions from valid, secular laws that are generally applicable. He determined that indirect harm, in this case a Sunday closing law, is permitted under the free exercise clause.

---

[120] Id., 723.
[121] Davis 150.
[122] *Thomas v. Review Board,* 450 U.S. 707, 728 (1981) (J. Rehnquist, dissenting).
[123] *Braunfeld v. Brown,* 366 U.S. 599, (1961).
[124] *Thomas v. Review Board,* 450 U.S. 707, 723 (1981) (J. Rehnquist, dissenting).

Rehnquist also cites Justice Stewart's dissent in *Schempp* to support his view that the establishment clause is currently interpreted too broadly by the court. He writes, "He explained that the Establishment Clause is limited to "government support of proselytizing activities of religious sects by throwing the weight of secular [authorities] behind the dissemination of religious tenets."[125] This means that the establishment clause is not violated by laws with a primarily secular purpose and effect that secondarily or indirectly aids religion. Since this belief underlines his interpretation of both the free exercise clause and establishment clause, it can be concluded that Rehnquist adheres to a principle of benevolent neutrality.

On the other hand, O'Connor recognizes the tension but does not believe that the two clauses will necessarily conflict. She argues that the challenge lies in establishing proper establishment clause limits on voluntary government efforts to facilitate the free exercise of religion.[126] O'Connor believes that the conflict between the two clauses can be avoided on the basis of religious liberty. O'Connor clearly addresses this issue in *Wallace v. Jaffree.* She argues, "The solution to the conflict between the Religion Clauses lies not in 'neutrality,' but rather in identifying workable limits to the government's license to promote the free exercise of religion. The text of the Free Exercise Clause speaks of laws that prohibit the free exercise of religion. On its face, the Clause is directed at government interference with free exercise. Given that concern, one can plausibly assert that government pursues Free Exercise Clause values when it lifts a government-imposed burden on the free exercise of religion. If a statute falls within this category, then the standard Establishment Clause test should be modified accordingly."[127] She argues that in situations in which the government may grant religion-based exemptions from valid, secular laws, individual perceptions of government endorsement may not matter.

---

[125] Id., 726.
[126] *Wallace v. Jaffree,* 472 U.S. 38, 83 (1985) (J. O'Connor, concurring).
[127] Id., 84.

O'Connor assumes that an objective observer would understand the values promoted by the free exercise clause and therefore, any other perceptions should be ignored. Whereas O'Connor stresses religious liberty, Rehnquist emphasizes a principle of benevolent neutrality as a basis for his religion clause jurisprudence.

F. *Rehnquist and O'Connor: A Final Comparison*

Although Rehnquist and O'Connor differ on whom the establishment clause should be neutral toward, they agree on what kind of aid is prohibited by the establishment clause. Rehnquist believes that the establishment clause only requires neutrality among particular religions and not between religion and irreligion. O'Connor, on the other hand, argues that the establishment clause requires neutrality between religion and irreligion, in addition to particular religions. Both justices believe, however, that the establishment clause prohibits direct aid. In addition, each justice argues that indirect or secondary aid to religion in general or any particular religion is not prohibited by the establishment clause.

Regarding the free exercise clause, each justice holds a different position on whether the free exercise clause guarantees a right to religion-based exemptions from valid, secular laws that are generally applicable. Whereas O'Connor believes that the free exercise clause does guarantee such a right, Rehnquist does not. Since O'Connor believes in the right to exempt a religious observer from a generally applicable law, she utilizes a compelling state interest test in cases of government coercion, whether directly or indirectly, to determine exactly when such an exemption is permissible. To withhold an exemption, the government must show that an 'unusually important' government interest is at stake and that the resulting burden is the 'least restrictive means' to address the government's interest. Rehnquist, on the other hand, does not employ such a test. Rather, he relies on a distinction upon direct and indirect harm. He

maintains that all indirect, nondiscriminatory harm is allowed under the free exercise clause, while direct harm is prohibited.

The set of differences between O'Connor and Rehnquist can be attributed to the large emphasis O'Connor places on religious liberty. She stresses the importance the founders placed on preserving religious liberty and has applied that to reconciling the two clauses. Rehnquist, however, relies not upon religious liberty to resolve the tension between the two clauses but on a principle of benevolent neutrality. Once again, Rehnquist's belief that the establishment clause does not require neutrality between religion and non-religion, but only neutrality between particular sects, highlights such a principle.

The discrepancies between O'Connor's and Rehnquist's interpretation of the religion clauses show that the question of how religious beliefs and practices should be treated by the government remains at the forefront of constitutional debate. It has, in fact, become even more controversial over time as the Supreme Court's interpretation has remained unclear and inconsistent. Therefore, numerous questions remain to be answered regarding which justice's interpretation of the religion clauses is most persuasive and whether it ought to be adopted by the Court, including its newest members.

V. *Rehnquist and O'Connor: A Critical Analysis*

The crucial issues are whether Rehnquist and O'Connor have a workable standard for distinguishing between aid or harm that is constitutional and that which is not constitutional and whether one justice is more consistent than the other in the application of their standard. Rehnquist and O'Connor disagree on a number of issues: the extent to which the religion clauses should be interpreted on the basis of their original meaning, the meanings of the two clauses, whom the government should be neutral toward, whether the free exercise clause guarantees

religion-based exemptions from generally applicable laws, whether the meanings of the two clauses conflict, and how to reconcile the two clauses. The differences between Rehnquist and O'Connor's interpretation of the establishment clause and free exercise clause show how difficult it has been for the Court to establish a clear, consistent, and practical interpretation of the religion clauses. Both interpretations, however, cannot be correct. I will argue that Justice Rehnquist's interpretation of the religion clauses is preferable to that of O'Connor and ought to be adopted by the Court, including its newest members.

Although both Rehnquist and O'Connor use an original understanding approach in their interpretation of the religion clauses, Rehnquist uses his approach more consistently. As a result, his overall legal philosophy is much more uniform than that of O'Connor, whose original understanding approach is applied inconsistently. Although O'Connor discusses the existence of state constitutional provisions, the practice of colonies and early states in regards to religion, and the writing of early leaders who helped to shape our Nation in order to establish the meaning of the establishment clause in *Wallace*, her application of the establishment clause remains inconsistent because she approaches each case individually, as in *Grumet,* to arrive at a practical conclusion. Her failure to adhere to a single test for deciding establishment clause cases represents a major weakness in her analysis, which suggests inconsistencies in her original understanding approach.

Whereas O'Connor fluctuates in her application of a single standard under the establishment clause, Rehnquist does not. He argues that historical evidence should be interpreted correctly so that the true meaning of the establishment clause can be discerned.[128] Since Rehnquist believes that the establishment clause acquired a well-accepted meaning from the history surrounding the adoption of the religion clauses, he believes that the establishment

[128] *Wallace v. Jaffree,* 472 U.S. 38, 113 (1985) (J. Rehnquist, dissenting).

clause prohibits the establishment of a national religion and preference among religious sects or denominations and thus, applies this to every establishment clause case. O'Connor, on the other hand, suggests that there are different categories of establishment clause cases, which may call for different approaches.[129] O'Connor, in using an original understanding approach clearly articulated in *Wallace*, still fails to adopt a single standard of analysis under the establishment clause, suggesting a weakness that is inherent in her inconsistent use of original understanding.

In addition to a difference in consistently using an original understanding approach, each justice holds a different position on whom the government should be neutral towards. Although both judges allow some aid under the establishment clause, they use a different standard to determine what is and is not allowed. O'Connor relies on the concept of neutrality between religion and irreligion, as well as among particular religions. Rehnquist, on the other hand, believes that the First Amendment was understood to prohibit only preferential support for certain religions over others.[130] Therefore, he believes that the establishment clause prohibits only laws that advance one or some religions, but not all religions. Laws that advance religion in general or all religions equally are not prohibited. O'Connor and Rehnquist use a different standard of neutrality to distinguish between aid that is constitutional and that which is not constitutional according to their original understanding approach.

Related to their respective concepts of neutrality, Rehnquist offers a distinction between religion and personal philosophical choice that O'Connor does not. In *Thomas v. Review Board,* Rehnquist discusses the implications that arise from defining Thomas' belief as a 'personal philosophical choice,' as opposed to a religious belief.[131] The main issue was whether Thomas' decision to voluntarily terminate his employment was more a personal philosophical choice than

[129] *Board of Education of Kiryas Joel v. Grumet,* 512 U.S. 687, 716 (1994) (J. O'Connor, concurring).
[130] Id., 93.
[131] *Thomas v. Review Board,* 450 U.S. 707, 724 (1981) (J. Rehnquist, dissenting).

a religious belief. The Court had to ask and answer this question in order to determine whether any burden placed on the employee's right to free exercise of his religion was justified by legitimate state interests.[132] The Indiana Supreme Court had determined the precise nature of Thomas' belief to be unclear. As a result, it concluded that the belief was more 'personal philosophical choice' than religious belief. Rehnquist argues that the Supreme Court's failure to take a position on this issue led to a major problem. He suggests that if a distinction is not made between religion and personal philosophical choice, individuals will be able to quit their jobs, assert that they did so for personal reasons, and collect unemployment insurance.[133] Rehnquist argues that this would open the way for all kinds of persons to get exemptions from all kinds of laws.

O'Connor, however, does not offer a distinction between religion and other beliefs, such as personal philosophical choices. This represents another major weakness in her approach. Although she argues that government classifications based on religion must be strictly scrutinized to ensure that the government is not directly favoring or disfavoring of religion, she uses the term "deeply held belief" rather than religious belief. The fact that she is talking about accommodations for religious groups is clear. However, her distinction between a religious group and an individual holding a deeply held belief raises the question of whether O'Connor is saying that accommodations should not be given just to deeply held, religious beliefs, but should be given to all deeply held beliefs, religious or not. She states, "A draft law may exempt conscientious objectors, but it may not exempt conscientious objectors whose objections are based on theistic belief (such as Quakers) as opposed to nontheistic belief (such as Buddhists) or

[132] Id.
[133] Id.

atheistic belief.[134] O'Connor's approach leaves room open for interpretation because it is unclear and inconsistent. Her argument that a conscientious objector whose objections are based on atheistic belief may be exempt from a generally, applicable law that most persons have to obey seems to contradict her interpretation of the free exercise clause, which will be discussed later.

Another failure is O'Connor's inability to adhere to a single test under the establishment clause. If there is no single test for deciding establishment clause cases, then this implies that there is no single interpretation of the clause. In her *Grumet* opinion, O'Connor even says that her endorsement test is not the only test that should be used.[135] This leads her to conclude that "Experience proves that the Establishment Clause, like the Free Speech Clause, cannot easily be reduced to a single test. There are different categories of Establishment Clause cases, which may call for different approaches."[136] She discusses four different categories of establishment clause cases and says that different tests should be used for each of them. O'Connor differentiates between cases that involve government action targeted at particular individuals, cases involving government speech on religious topics, cases in which the government must make decisions about matters of religious doctrine and religious law, and cases involving government delegations of power to religious bodies.[137] Her argument that the establishment clause cannot be reduced to a single, unitary test represents a major weakness in her approach. Because O'Connor argues that different tests should be used for four different categories of establishment clause cases, this opinion suggests that she prefers a case-specific, pragmatic approach rather then one single test for the establishment clause. This is inconsistent with the clear application

[134] *Board of Education of Kiryas Joel v. Grumet,* 512 U.S. 687, 717 (1994) (J. O'Connor, concurring).
[135] Id., 720.
[136] Id., 721.
[137] Id.

of the endorsement test in cases such as *Mitchell v. Helms, Lynch v. Donnelly,* and *Rosenberger v. University of Viriginia.*

O'Connor's *Grumet* opinion also raises numerous questions about accommodation.[138] She starts out as if she is completely committed to the concept of neutrality. O'Connor writes, "Religious needs can be accommodated through laws that are neutral with regard to religion."[139] Not only does she call for neutrality among religions but between religion and irreligion. In addition, O'Connor gives examples of laws that are acceptable because the accommodations they give are given to non-religious persons (atheists) as well as religious persons. One of her main arguments in *Grumet* is that what makes accommodation permissible, even praiseworthy, is that the government is not making life easier for some particular religious group but that it is accommodating a deeply held belief. This raises an important question: is she saying that the only kind of accommodations (exemptions) that may be given are those that are necessary to prevent individuals from having to act in a way that is inconsistent with a deeply held belief? If so, this could mean that most religious institutions, like churches, could never qualify for accommodations or exemptions because they cannot have deeply held beliefs. O'Connor may just mean that there are many kinds of religious "exercises" that could not be accommodated by the government because they are not required by a deeply held belief. However, her explanation remains unclear and needs to be further clarified in order to answer the question of whether the only kind of accommodations (exemptions) that may be given are those that are necessary to prevent individuals from having to act in a way that is inconsistent with a deeply held belief.

O'Connor's argument in *Amos,* however, contradicts her argument in *Grumet* that what makes accommodation permissible, even praiseworthy, is not that the government is making life

[138] Id.
[139] Id., 718.

easier for some particular religious group as such but rather, that it is accommodating a deeply held belief.[140] By providing an exemption to a religious organization from a generally applicable regulatory burden that did not threaten a deeply held belief, she contradicts her statement in *Grumet* that accommodations are needed to protect deeply held beliefs and, thus, the individuals who hold them. In *Amos,* she explains that "in order to perceive the government action as a permissible accommodation of religion, there must in fact be an identifiable burden *on the exercise of religion* that can be said to be lifted by the government action."[141] Whereas *Grumet* addresses accommodations in relation to a deeply held belief, O'Connor argues in *Amos* that accommodations may be related to the exercise of religion in general. What she fails to address is a connection between the two when discussing accommodations. For example, does the exercise of religion in general necessarily have to be related to a deeply held belief? In *Amos,* O'Connor determined that the church had a right to hire and fire employees on the basis of religion even though this did not threaten a deeply held belief. This point needs to be clarified if O'Connor is to offer a consistent application of the establishment clause in relation to accommodations.

Whereas O'Connor's *Grumet* opinion raises numerous questions about the consistency of her interpretation of the establishment clause, Rehnquist's establishment clause jurisprudence is much more clear and consistent. His opinions, including *Van Orden v. Perry, Stone v. Graham, Mueller v. Allen,* and *Santa Fe Independent School District v. Doe* all adhere to his establishment clause standard, which allows government aid to particular religions so long as the aid is secondary and/or indirect. In other words, so long as the primary purpose and effect of a law is secular in nature, then it does not matter to Rehnquist if a particular religion benefits indirectly or

[140] *Corporation of Presiding Bishop v. Amos,* 483 U.S. 327 (1987) (J. O'Connor, concurring).
[141] Id., 349.

secondarily from the law. Rehnquist's method is preferable to that of O'Connor because he shows it is able to be applied consistently, whereas O'Connor's standard is not.

Rehnquist also offers a more uniform interpretation of the free exercise clause than O'Connor. The main issue over which the justices differ is whether the clause guarantees a right to religion-based exemptions from general laws that most persons have to obey. Rehnquist relies on a distinction between direct and indirect harm, while O'Connor relies upon a compelling state interest test in both cases, so long as coercion is present.

In deciding when to use the compelling state interest test, O'Connor fails to offer a clear distinction between what she terms coercive burdens and incidental burdens upon religion. Since O'Connor does believe that the free exercise clause guarantees a right to religion-based exemptions, she utilizes a compelling interest analysis. Laws with the tendency to coerce individuals, whether directly or indirectly, into acting contrary to their religious beliefs require a religion-based exemption unless the government can show that an "unusually important" government interest is at stake and that the resulting burden on the exercise of religion is the "least restrictive means" to attain the government's interest.[142] In determining when to use the compelling state interest test, O'Connor distinguishes between coercive burdens and purely incidental burdens.

It is difficult to understand, under O'Connor's approach, when coercion is involved because of her reasoning in *Lyng* and her reasoning in *Smith* and thus, when to use the compelling state interest test. Although O'Connor utilizes the test in *Smith* because she recognizes that peyote is a sacrament of the Native American Church and is regarded as vital to their ability to practice their religion, she does not use the same test in *Lyng*. She acknowledges in *Lyng* that the rituals would be ineffective at other sites and that too much disturbance

[142] Spreng 862.

surrounding the area used for rituals would result in a discontinuation of religious practices, yet does not use the compelling state interest test. She determines that no coercion is present even though the log-rolling and road-building projects would have severe adverse effects on the practice of the Native Americans' religion. This highlights an inconsistency in the coercion standard used by O'Connor to determine in which circumstances the use of the compelling interest test is justifiable.

Rehnquist, on the other hand, offers a clear approach in deciding free exercise cases. He relies on a distinction between direct and indirect harm to religion. In *Thomas v. Review Board of Indiana Employment Security Division,* Rehnquist found no violation of the free exercise clause because the state of Indiana, in the interest of legitimate secular goals, had enacted a law that denied unemployment compensation to persons who refused to do certain work for "personal" reasons and were fired and that contained no exception for persons whose refusal was religiously motivated.[143] He concludes that there is no violation because he finds that where "a state has enacted a general statute, the purpose and effect of which is to advance the State's secular goals, the Free Exercise Clause does not, in my view, require the state to conform that statute to the dictates of religious conscience to any group."[144] Direct harm is always prohibited, but indirect harm, under which the primary purpose and effect of the statute is secular, is always permissible under the free exercise clause. Thus, Rehnquist's approach is always clear and consistent. The free exercise clause prohibits direct harm but permits indirect, nondiscriminatory harm.

In addition to having a clear and workable standard for determining what is and is not allowed under the establishment clause and free exercise clause, Rehnquist also has a sound

---

[143] *Thomas v. Review Board,* 450 U.S. 707, (1981) (J. Rehnquist, dissenting).
[144] Id., 724.

approach to reconciling the tension between the two clauses that has been created by the Court. In order to diminish the tension, Rehnquist calls for the principle of benevolent neutrality. He believes that both the establishment clause and free exercise clause are interpreted too broadly by the Court. Rehnquist reiterates that the establishment clause does not require neutrality between religion and non-religion, but only among different religions or sects. He believes that the establishment clause limits only "government support of proselytizing activities of religious sects by throwing the weight of secular [authorities] behind the dissemination of religious tenets."[145] Under the principle of benevolent neutrality, Rehnquist says that the establishment clause allows indirect aid to religion, the natural corollary to which is that the free exercise clause allows indirect restriction on the exercise of religion.[146] If the government were sometimes compelled to single out religious conduct for exemption, this could be seen as aiding or favoring religion within those decisions, conflicting with the establishment clause. Because of the conflict between religious liberty and equal treatment between particular sects, according to Rehnquist, the government is free to indirectly restrict the exercise of religion, thus reconciling the tension between the two clauses.

Although O'Connor stresses neutrality between religion and irreligon, she believes that the conflict between the two clauses can be avoided on the basis of religious liberty. She upholds exemptions as part of an overall scheme that treats religion distinctively in order to secure religious liberty. However, the fact that religious exemptions treat activity differently when performed for religious reasons rather than non-religious reasons conflicts with her establishment clause jurisprudence because it may, in some cases, give improper special treatment to religion. O'Connor contends that "the solution to the conflict between the Religion

---

[145] Id., 726.
[146] Davis 150.

Clauses lies not in 'neutrality,' but rather in identifying workable limits to the government's license to promote the free exercise of religion."[147] However, her reliance on coercion in deciding when to use the compelling interest test, as discussed earlier, has not established a workable limit to promote the free exercise of religion. It results in discrepancies such as in *Lyng* and *Smith,* which only further undermines an approach based upon religious liberty.

Rehnquist's approach offers a better solution to the conflict between religious liberty and equal treatment between particular sects because it rules out the possibility that exemptions may give improper special treatment to religion. Under O'Connor's approach, the possibility exists that exemptions treating activity performed for religious reasons rather than non-religious reasons may be seen as special treatment, thus conflicting with her establishment clause standard requiring neutrality between religion and irreligion.

VI. *Conclusion*

Overall, Rehnquist has a clear and workable standard for determining what is and is not allowed under the establishment clause and free exercise clause. His reliance upon original understanding offers a sound approach because he applies it consistently, whereas O'Connor does not. Rather, she fails to adopt a single standard of analysis under the establishment clause, suggesting a weakness that is inherent in her inconsistent use of original understanding.

In *Grumet,* O'Connor fails to adhere to a single test under the establishment clause. She discusses four different categories of establishment clause cases and says that different tests should be used for each of them. Rather than adhere to one single test for the establishment clause, O'Connor prefers to use a case-specific, pragmatic approach. Thus, the argument that the establishment clause cannot be reduced to a single, unitary test represents an inconsistency in O'Connor's establishment clause analysis. Whereas O'Connor relies upon the endorsement test

[147] *Wallace v. Jaffree,* 472 U.S. 38, 84 (1985) (J. O'Connor, concurring).

in *Mitchell v. Helms, Rosenberger v. University of Virginia,* and *Lynch v. Donnelly,* she suggests in *Grumet* that her endorsement test is not the only test able to be used. This renders her interpretation of the establishment clause unclear and contradictory.

In addition, O'Connor does not distinguish clearly between religion and other beliefs, such as personal philosophical choice. Rehnquist, on the other hand, does. He argues that if a distinction is not made between religion and personal philosophical choice, far too many individuals will be able to get exemptions from far too many laws. Thus, the confusion does not exist, like it does under O'Connor's approach, as to whether accommodations should be given to all deeply held beliefs, religious or not.

O'Connor also remains inconsistent in applying more than one test for deciding free exercise cases. Her approach in deciding whether or not to use the compelling interest test in free exercise cases fails to offer a clear distinction between what she terms coercive burdens and incidental burdens upon religion. Thus, it is hard to reconcile what she says in *Lyng* and what she says in *Smith.* It is extremely difficult to see how a government action that has devastating effects on traditional Indian religious practices, which O'Connor admits in her *Lyng* opinion, does not fall under her coercion standard, whereas a law that makes a certain drug illegal, when used in a Native American religious ceremony, does.

Rehnquist, on the other hand, has a clear approach in deciding free exercise cases. He relies on a distinction between direct and indirect harm to religion. Thus, he determines that so long as a state has enacted a general statute, the purpose and effect of which is to advance the State's secular goals, a religion-based exemption is not required under the free exercise clause. His approach is consistent and always results in the determination that the free exercise clause prohibits direct harm to religion and permits indirect, nondiscriminatory harm.

In addition, Rehnquist's approach on how to reconcile the two clauses is preferable to that of O'Connor. Whereas O'Connor believes that the conflict between the two clauses can be avoided on the basis of religious liberty, Rehnquist calls for a principle of benevolent neutrality. Under O'Connor's approach, the fact that religious exemptions treat activity differently when performed for religious reasons conflicts with her establishment clause jurisprudence because it may, in some cases, give improper special treatment to religion. In addition, her reliance upon coercion has not established a workable limit to promote the free exercise of religion. Rehnquist, however, believes that both the establishment clause and the free exercise clause are interpreted too broadly by the Court and thus, under the principle of benevolent neutrality, allows for the accommodation of religion under certain circumstances. As such, he maintains a workable standard to determine in which cases accommodations, and thus exemptions, are permitted under the religion clauses. Therefore, Rehnquist overall has a clear and workable standard for distinguishing between aid or harm that is prohibited by the establishment clause and free exercise clause. Such an approach should be adopted by the Court in order to reduce the difficulties in establishing a clear, consistent, and practical application of the religion clauses.

VII. *Bibliography*

Bibliography of Primary Sources

REHNQUIST, WILLIAM H.

Dissenting Opinions

Stone v. Graham, 449 U.S. 39, (1980).

Thomas v. Review Board, 450 U.S. 707 (1981).

Wallace v. Jaffree, 472 U.S. 38 (1985).

Hobbie v. Unemployment Appeals Comm'n of Florida, 480 U.S. 136 (1987).

Sante Fe Independent School District v. Doe, 530 U.S. 290 (2000).

Majority Opinions

Mueller v. Allen, 463 U.S. 388, (1983).

Goldman v. Weinberger, 475 U.S. 503 (1986).

Webster v. Reproductive Health Services, 492 U.S. 490 (1989).

Zelman v. Simmons-Harris, 536 U.S. 639 (2002).

Locke v. Davey, 540 U.S. 712 (2004).

Van Orden v. Perry, 545 U.S. (2005).

Concurring Opinions

Elk Grove United School District v. Newdow, 542 U.S. 1 (2004).

O'CONNOR, SANDRA DAY

Dissenting Opinions

Goldman v. Weinberger, 475 U.S. 503 (1986).

Bowen v. Roy, 476 U.S. 693 (1986).

City of Boerne v. Flores, 521 U.S. 507 (1997).

Van Orden v. Perry, 545 U.S. (2005).

Majority Opinions

Lying v. Northwest Indian CPA, 485 U.S. 439 (1988).

Board of Education of Westside Community Schools v. Mergens, 496 U.S. 226 (1990).

Concurring Opinions

Lynch v. Donnelly, 465 U.S. 668 (1984).

Wallace v. Jaffree, 472 U.S. 38 (1985).

Bowen v. Roy, 476 U.S. 693 (1986).

Corporation of Presiding Bishop v. Amos, 483 U.S. 327 (1987).

County of Allegheny v. ACLU, 492 U.S. 573 (1989).

Employment Division of Oregon v. Smith, 494 U.S. 872 (1990).

Board of Education of Kiryas Joel v. Grumet, 512 U.S. 687 (1994).

Rosenberger v. University of VA, 515 U.S. 819 (1995).

Mitchell v. Helms, 530 U.S. 793 (2000).

Zelman v. Simmons-Harris, 536 U.S. 639 (2002).

Elk Grove Unified School District v. Newdow, 542 U.S. 1 (2004).

McCreary County v. ACLU, 545 U.S. 844 (2005).

Bibliography of Secondary Sources

GENERAL

Berg, Thomas. *The State and Religion*. St. Paul, MN: West Group, 2004.

REHNQUIST, WILLIAM H.

Bradley, Craig, editor. *The Rehnquist Legacy*. N.Y.: Cambridge University Press, 2006.

Davis, Derek. *Original Intent: Chief Justice Rehnquist and the Course of American Church/State Relations*. Amherst, NY: Prometheus Books, 1991.

Davis, Sue. *Justice Rehnquist and the Constitution*. Lawrenceville, NJ: Princeton University Press, 1989.

Hall, Melinda. "An Analysis of the Rehnquist Court's Establishment Clause Jurisprudence: A New Marriage of Legal and Social Science Approaches." *Law Review of Michigan State University- Detroit College of Law*: Winter, 1999.

O'CONNOR, SANDRA DAY

Beschle, Donald. "The Conservative as Liberal: The Religion Clauses, Liberal Neutrality, and the Approach of Justice O'Connor." *Notre Dame Law Review*: 1987.

Brownstein, Alan. "A Decent Respect for Religious Liberty and Religious Equality: Justice O'Connor's Interpretation of the Religion Clauses of the First Amendment." *McGeorge Law Review*: Spring, 2001.

Failinger, Mary. "In Praise of Contextuality- Justice O'Connor and the Establishment Clause." *Hamline Law Review*: Winter, 2006.

Feder, Benjamin D. "And a Child Shall Lead Them: Justice O'Connor, the Principle of Religious Liberty, and Its Practical Application." *Pace Law Review*, 8 (1988).

Loewy, Arnold. "Rethinking Government Neutrality Towards Religion Under the Establishment Clause: The Untapped Potential of Justice O'Connor's Insight." *North Carolina Law Review*: June, 1986.

Nesbit, Christopher. "County of Allegheny v. ACLU: Justice O'Connor's Endorsement Test." *North Carolina Law Review*: March, 1990.

Spreng, Jennifer. "Failing Honorably: Balancing Tests, Justice O'Connor and Free Exercise of Religion." *Saint Louis University Law Journal*: Spring, 1994.